

August 31, 2005

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**Re: Your Request for Advice  
Our File No. A-05-142**

Dear Mr. Boga:

This letter is in response to your request on behalf of Councilmember Robert Slavin, City of Westlake Village for advice regarding the conflict-of-interest provisions of the Political Reform Act (the “Act”).<sup>1</sup> Nothing in this letter should be construed to evaluate any conduct that has already taken place. In addition, this letter is based on the facts presented. The Fair Political Practices Commission (the “Commission”) does not act as the finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

### QUESTIONS

1. If the city retained a second appraiser, and that person disagreed with the current appraisal’s conclusion regarding the impact of the Planning Area C decisions on the Agora Hill-Thousand Oaks-Westlake Village office market area, would the conflicting opinions preclude a finding that it is reasonably foreseeable that the decisions will have a material financial effect on Councilmember Slavin’s business interest?

2. Does the “significant segment” test for an industry, trade, or profession under regulation 18707.7(b) apply for Planning Area C decisions that will affect Councilmember Slavin’s economic interest?

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<sup>1</sup> Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

3. Can a determination be made under the exceptional circumstances standard in regulation 18707.1(b)(1)(E) that the Planning Area C decisions will affect a segment of the population and that such segment constitute a significant segment of the public generally?

4. Can a determination be made under any other standard that the Planning Area C decisions will affect Councilmember Slavin's business interest in a manner that is indistinguishable from the manner in which the decisions will affect the public generally?

### **CONCLUSIONS**

1. No. An opposite conclusion drawn by one or more different appraisers, in and of itself, will not preclude a finding that it is reasonably foreseeable that the decisions will have a material financial effect on Councilmember Slavin's economic interest. Before a second appraisal can be relied upon, a good faith effort must be made by the public official to determine that the original appraisal is without support.

2. No. The industry does not constitute a significant segment under regulation 18707.7(b) because it is not a predominate industry in the official's jurisdiction as it does not constitute fifty percent or more of business entities in the jurisdiction of the official's agency.

3. No. You have not provided any facts that would indicate that there are any exceptional circumstances regarding the decision.

4. No. Under the current facts presented, there are no other standards applicable that would allow a determination that the Planning Area C decisions will affect Councilmember Slavin's business interest in a manner that is indistinguishable from the manner in which the decisions will affect the public generally.

### **FACTS**

The City of Westlake Village (the "City") has received applications from Lowe's for a general plan amendment, zone change, development agreement amendment, and planned development permit for the property known as Planning Area C of the Westlake North Specific Plan. Pursuant to an existing development agreement, this undeveloped property currently is entitled for 376,000 square feet of business park use. The Lowe's applications propose replacement of the business park use with approximately 236,000 square feet of general commercial use. A preliminary site plan depicts a 175,000 square-foot home improvement store and 61,000 square feet of retail commercial use consisting of shops and restaurants.

Councilmember Slavin owns a business named Gershon La Verne ("GLV"), which is a California limited liability company. He has informed our office that GLV's sole asset is an office building located at 125 Auburn Court, Thousand Oaks, California.

He has also indicated that GLV is not listed and does not meet the financial criteria for listing on the Fortune 500, the New York Stock Exchange, the NASDAQ, or the American Stock Exchange.

There are 92 office buildings in Westlake Village. Based on available information, after accounting for office parks, ownership of these buildings is divided among 69 separate persons or entities. These buildings comprise approximately four million square feet of office space, which represents approximately 88% of the City's commercially-zoned acreage. According to a 2003 Chamber of Commerce census, which is the most recent available, there are approximately 950 businesses in Westlake Village.

The City retained an appraiser, Ron Laurain of Laurain & Associates, to analyze whether it is reasonably foreseeable that the Planning Area C decisions will have a material financial effect on GLV within the meaning of the PRA. Mr. Laurain opined that it is not reasonably foreseeable that the decisions will have a material financial impact on GLV's gross revenues or expenses. Mr. Laurain also opined, however, that it is reasonably foreseeable that the decisions will have a material financial effect on the value of GLV's sole asset (the office building in Thousand Oaks), which he estimated lies approximately 2.5 miles west of Planning Area C. Finally, Mr. Laurain opined that the impact on Councilmember Slavin's business assets would exceed \$20,000. In his view, all owners of office buildings in the tri-city office building market area (Agoura Hills, Thousand Oaks, and Westlake Village) will be impacted due to the amount of office space that could be added to or removed from the market as a result of the Planning Area C decisions.

### **ANALYSIS**

#### **POTENTIAL CONFLICT OF INTEREST**

The Act's conflict-of-interest provisions ensure that public officials will "perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them." (Section 81001(b).) Section 87100 prohibits any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest.

The Commission has adopted an eight-step standard analysis for deciding whether an official has a disqualifying conflict of interest. (Regulation 18700(b).) The general rule is that a conflict of interest exists whenever a public official makes a governmental decision which has a reasonably foreseeable material financial effect on one or more of his or her financial interests.

According to your stated facts, Councilmember Slavin has a conflict of interest in participating in the city council decision regarding Planning Area C because the decision would have a reasonably foreseeable financial effect on his business interest in GLV. This is based on an appraisal submitted that estimates the material financial effect on the

value of his business (GLV and it's sole asset – the office building), which is a relatively small business under regulation 18705.1(c)(4), at over \$20,000. (Regulation 18705.1(c)(4)(C).)

Your first question asks: if a second appraiser reached a different conclusion as to the material financial effect of the decisions on Councilmember Slavin's economic interest, would the conflicting opinions preclude a finding that it is reasonably foreseeable that the decisions will have a material financial effect on his economic interest?

The Commission does not act as the finder of fact in providing advice. Thus, where different appraisals reach conflicting conclusions, the Commission cannot evaluate which appraisal finding more accurately determines whether or not a materiality threshold will be met as a result of a governmental decision. We have advised that an appraisal, although not required, by a disinterested and otherwise qualified real estate professional, based on an accurate understanding of all pertinent facts and circumstances, will generally be considered a good faith effort by a public official to assess the financial effect of a decision on his or her economic interest. (*Wainwright* Advice Letter, A-03-179; *Wallace* Advice Letter, No. A-03-069; *Vadon* Advice Letter, No. A-02-080.)

However, a public official may not simply rely on a third-party appraisal without further inquiry into the qualifications of the appraiser, whether he or she considered the factors listed in our regulations, and whether the conclusions reached by the appraiser are objectively defensible, that is, based on a full and accurate assessment of all pertinent facts and circumstances. (*Peck* Advice Letter, No. I-04-007.) This is especially so where two appraisals reach conflicting conclusions. A public official may not simply shop around until he or she finds an appraiser that will reach the conclusion he or she desires, and then rely on that conclusion in order to navigate a way out of the materiality standards provided under Commission regulations.

Ordinarily, a validly executed appraisal by a state licensed certified commercial appraiser establishing that a materiality threshold is substantially likely to be met as a result of a governmental decision will support such a showing. Any subsequent appraisal drawing a different conclusion, in and of itself, would not preclude such a showing without establishing that the original appraisal is without support. Again, because the Commission does not act as a finder of fact, we do not advise as to the validity of any specific appraisal or what specific actions of a public official constitute a good faith effort.

Since you have determined, under the facts presented, that a conflict exists under Steps 1 through 6, you ask solely for advice regarding Step 7, the "public generally" exception.

### THE PUBLIC GENERALLY EXCEPTION

Even if a public official determines that his or her economic interest will experience a material financial effect as a result of the governmental decision before the official, he or she may still participate under the “public generally” exception if the material financial effect of a governmental decision on a public official’s economic interests is indistinguishable from its effect on the public generally. (Section 87103, regulation 18707.) Regulation 18707.1, subdivision (a) establishes a two-part test for making this determination. Under this test, the material financial effect of a governmental decision on a public official’s economic interests is indistinguishable from its effect on the public generally if the decision affects a *significant segment* of the public generally and the governmental decision will financially affect the public official’s interest in *substantially the same manner* as it will affect the significant segment identified.

Significant Segment: Regulation 18707.1(b) sets forth separate definitions of a “significant segment” depending on the nature of the economic interest involved. When a public official’s economic interest is a business entity, subdivision 18707.1(b)(1)(C) requires that the decision also affects either 2,000 or twenty-five percent of all business entities in the jurisdiction of the district the official represents, so long as the affect is on persons composed of more than a single industry, trade, or profession.

The governmental decisions involves a zoning change from “business park, midrise office, four story maximum” to “general commercial,” and the preliminary site plan depicts a home improvement store and retail commercial consisting of shops and restaurants. Accordingly, the financial effect of the decision appears to reach more than one industry, trade, or profession. (See, *Ball* Advice Letter, No. I-05-022, where the decision was to adopt a one dollar per room/per night assessment on hotels, thereby affecting only the hotel industry.)

Therefore, the significant segment test for business entities under regulation 18707.1(b)(1)(C) applies, and the decision must also affect either 2,000 or twenty-five percent of all business entities in the jurisdiction. You have indicated that there are 69 separate business entities that own the 92 office building in Westlake Village. There are 950 businesses in Westlake Village. You have not provided sufficient information to determine what businesses, other than office buildings, will be affected, in order to ascertain whether or not twenty-five percent of the businesses in the jurisdiction will be affected by the decision. Accordingly, we cannot determine if the significant segment test has been met.

Your request seeks advice as to the applicability of the public generally exception for industries, trades, and professions, under regulation 18707.7(b). This exception to the rule that a significant segment cannot consist of only one industry, trade, or profession is meant to apply to a situation where a local economy is based on one industry, so that

almost any public official would have an economic tie to that industry. (*Ennis* Advice Letter, No. A-97-270; *Woods* Advice Letter, No. A-94-164.) Regulation 18707.7 states:

Where a decision will affect an industry, trade, or profession in substantially the same manner as the decision will affect an official's economic interest, the industry, trade, or profession constitutes a "significant segment" of the jurisdiction only as set for the below

{ ... }

(b) In the case of any other official, an industry, trade, or profession constitutes a significant segment of the public generally if that industry, trade, or profession is a predominant industry, trade or profession in the official's jurisdiction or in the district represented by the official. An industry, trade, or profession that constitutes fifty percent or more of the business entities in the jurisdiction of the official's agency or the district the official represents is a "predominant" industry, trade, or profession for purposes of this regulation....

Although you have indicated that the governmental decisions will have the same overall percentage impact on all owners of office buildings in the tri-city office building market, financial impacts are measured in terms of dollars and not percentages. (See, *Berger* Advice Letter, No. A-05-054.) Therefore, the overall financial effect, measured in terms of dollars, must be substantially the same. You have not provided any information as to this factor.

Even if the financial effects are substantially the same, you have not shown that the office building market is a predominant industry in the jurisdiction. Under the facts presented, there are only 69 business entities in the jurisdiction that operate in the office building market out of approximately 950 businesses altogether. Accordingly, the predominant industry requirement is not met.

You have suggested that in the *Trendacosta* Advice Letter, No. A-95-3710, "the FPPC deemed an industry to be a 'predominant industry' based solely on market share" with respect to the rental housing market, and that this "rationale seems equally applicable here, given that office space comprises the bulk (88%) of the City's commercially-zoned acreage." This letter cited the Commission's Opinion in *In re Ferraro*, 4 FPPC Ops. 62, which was codified in regulation 18707.9, and applies only to residential properties where the official owns three or fewer residential property units.

Furthermore, the advice provided in *Trendacosta, supra*, was superseded by the *Ennis* Advice Letter, *supra*, which was provided to a member of your firm. Accordingly, the exception provided in regulation 18707.7 is not applicable under the facts given.

Finally, you ask if the exceptional circumstance provision under regulation 18707.1(b)(1)(E) is applicable to the governmental decisions in question or if there are any other standards that would allow Councilmember Slavin to participate under the public generally exception. You have not provided any facts that would support a finding that, due to exceptional circumstance regarding the decision, the decision will affect a segment of the population that constitutes a significant segment of the public generally under regulation 18707.1(b)(1)(E). There are no other standards provided that would support a conclusion that the public generally exception would apply under the facts given.

If you have any other questions regarding this matter, please contact me at (916) 322-5660.

Sincerely,

Luisa Menchaca  
General Counsel

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Counsel, Legal Division

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